Supreme Court, U. S.
FILED
OCT 20 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-152

CHARLES WILLIAM WHORLEY,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition For A Writ Of Certiorari To The Judgment Of
The Supreme Court Of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court–State Librray Building
Richmond, Virginia 23219

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BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia in this case of April 28, 1975, not be granted.

The opinion of the Supreme Court of Virginia to which this petition lies was entered in this case on April 28, 1975, and is reported as *Whorley* v. *Commonwealth,* 215 Va. 740, ... S.E.2d ..... (1975). The opinion is set forth in the appendix to the petition for a writ of certiorari previously filed in this case.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

May One Who Is Civilly Classified As An Habitual Offender And Who Is Not Subject To A Present Deprivation Of Liberty In The Form Of A Jail Sentence, But Who Has, As A Basis For The Habitual Offender Status, A Previously Uncounseled Misdemeanor Conviction Which Resulted In A Jail Sentence Rather Than A Fine, Successfully Challenge His Status As An Habitual Offender By Subsequently Violating The Law Of A State That He Not Drive And Defending On The Basis Of The Retroactivity Of This Court's Decision In Argersinger v. Hamlin, 407 U.S. 25 (1972)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the petition for a writ of certiorari previously filed in this case.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

On June 12, 1964, Whorley was convicted in the County Court of Bedford County, Virginia, of reckless driving and his license was suspended for a period of six months; on December 29, 1965, Whorley was convicted in the State of North Carolina of speeding 85 M.P.H. in a 65 M.P.H. zone; on January 16, 1968, Whorley was convicted in the County Court of Bedford County, Virginia, of drunk driving; on March 5, 1968, Whorley's driver's license was revoked and suspended as a result of the January 16, 1968, conviction;

on April 3, 1968, Whorley was convicted in the Municipal Court in Lynchburg, Virginia, of reckless driving and driving during the period of time when his license was revoked; on May 10, 1968, a further order of revocation and suspension of license was issued; on June 10, 1969, Whorley was convicted in the County Court of Bedford County, Virginia, of reckless driving; on July 22, 1969, Whorley was convicted in the County Court of Bedford County, Virginia, for illegal equipment; on September 26, 1969, Whorley was convicted in the Municipal Court of the City of Lynchburg of driving while under the influence of intoxicants, second offense; on December 23, 1969, a third order of revocation and suspension of Whorley's driver's license was issued as a result of the two convictions of driving while intoxicated.

As a result of these series of convictions, and other actions, on November 4, 1970, Whorley was adjudged an habitual offender and was ordered not to operate a motor vehicle on the highways of the Commonwealth of Virginia for a period of ten years. He was specifically advised at that time that, if he were convicted of operating a motor vehicle in Virginia during the period of suspension, he could be sentenced to not less than one, nor more than five years in the penitentiary. See § 46.1-387.8, Code of Virginia (1950), as amended, which may be found at pages 5-6 of the petition for a writ of certiorari.

On January 6, 1973, Whorley was arrested and charged with operating a motor vehicle in violation of the habitual offender order, entered as a result of the proceedings mentioned herein. Whorley was arrested because of his involvement in an accident near the City of Lynchburg, Virginia, when the automobile he was operating struck another vehicle in the rear and left 795 feet of skid marks from the point of impact to the point where the vehicle was abandoned. Whorley pleaded not guilty and offered as his sole

defense the proposition that his September 26, 1969, conviction for drunken driving in Lynchburg, Virginia, was null and void because he was not afforded representation by counsel, and he had not waived such representation. The Supreme Court of Virginia, after granting appeal and entertaining the briefs and arguments of counsel, affirmed the conviction as set forth in the appendix to the petition for a writ of certiorari.

ARGUMENT

The Decision Of The Supreme Court Of Virginia In Whorley v. Commonwealth Is Clearly Correct And Eminently Fair To This Petitioner. There Is No Real Conflict In The Decisions Cited By The Petitioner In This Case, Since They Are Distinguishable Either On Their Facts Or They Are Not In Conflict. Nor Is This Court Likely On The Record Presented Here To Reach The Constitutional Issue With Respect To Retroactivity.

Petitioner seeks in this case to raise an issue concerning the retroactivity of *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), under *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973). Neither case is applicable here, since Whorley is subject to imprisonment not as a result of his uncounseled misdemeanor conviction here, nor is he subject to reincarceration as a result of the uncounseled offense. Compare *Berry* v. *Cincinnati, supra*, and the cases cited therein where there was an existing case or controversy sufficient to invoke the jurisdiction of a Federal court. In Whorley's situation it was the subsequent violation of the law which placed his continued liberty in peril. See *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967); *Mays* v. *Harris*, ... F.2d ....., Case No. 74-1409 (4th Cir. Aug. 26, 1975).[1]

[1] The first *Mays* v. *Harris* decision, decided on June 25, 1975, and cited in the petition for a writ of certiorari filed herein, has been withdrawn by the Fourth Circuit Court of Appeals. Thus, there exists no conflict between the opinions of the Fourth Circuit or a split between the panels. Compare *Marston* v. *Oliver*, 485 F.2d 705 (4th Cir. 1973); *Ferguson* v. *Gathright*, 485 F.2d 504 (4th Cir. 1973); *Morgan* v. *Juvenile and Domestic Relations Court*, 491 F.2d 456 (4th Cir. 1974) (decided post *Berry, supra*), and the second *Mays* v. *Harris* opinion of August 25, 1975. The respondent is advised that a Notice of Appeal has been filed in the second *Mays* v. *Harris* opinion to this Honorable Court.

It is of note that the Fourth Circuit Court of Appeals and the Supreme Court of Virginia are in agreement with the result reached in *Cottle* v. *Wainwright*, 477 F.2d 269 (5th Cir. 1973), vacated and remanded, 414 U.S. 895 (1973), rehearing, 493 F.2d 397 (5th Cir. 1974), in those situations where the uncounseled, prior misdemeanor conviction result was the automatic and immediate loss of liberty on the part of a defendant. See *Marston* v. *Oliver*, 485 F.2d 705, 710 (4th Cir. 1973), and *Whorley* v. *Commonwealth, supra* at 742.

Clay v. *Wainwright*, 470 F.2d 478 (5th Cir. 1972), is distinguishable from Whorley's situation on the facts. While Clay's potential reincarceration was the result of his subsequent violation of the law, it was at the trial of this subsequent offense, where Clay was an uncounseled misdemeanant, which brought Clay under the threat of loss of liberty by imprisonment at the parole revocation hearing. Compare the parallel stage in Whorley's case, which was his civil habitual offender determination, and which did not result in the immediate threat of imprisonment as did Clay's parole hearing. Whorley's subsequent deliberate violation of the order entered against him resulted in his peril. This peril was achieved only as a consquence of his violation of the order of the court, as in *Walker* v. *Birmingham, supra*. It is also in light of this particular fact that this Court should not exercise its discretion in granting certiorari on the grounds that, even if the opinion of the Supreme Court of Virginia and those of the Fourth Circuit Court of Appeals with respect to limitations placed on *Argersinger, supra* and

Berry, supra, are incorrect, this Honorable Court is not likely to be confronted with that constitutional issue in light of Whorley's deliberate defiance of the order of the court.

It is respectfully urged, however, that the opinion of the Supreme Court of Virginia is clearly correct in that an uncounseled misdemeanant conviction, though resulting in imprisonment, is not invalid *per se,* but only to invalidate the imprisonment, and that the interpretation placed on *Berry, supra,* with respect to the existing case or controversy sufficient to invoke the jurisdiction of a Federal court be limited to those situations cited by this Court in *Berry,* where the appellate process was initiated at the time the aggrieved person was in custody as a direct result of the uncounseled conviction and there were some serious collateral consequences from the conviction adhering to the person. See *Sibron* v. *New York,* 392 U.S. 40 (1968); *Carafas* v. *LaVallee,* 391 U.S. 234 (1968); *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

It is further submitted that the Supreme Court of Virginia was clearly correct in its interpretation of *Argersinger, supra,* with respect to the application of the *Gideon* doctrine. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). See *Whorley* v. *Commonwealth, supra,* at 744-5. The basis for such an interpretation is that the public has a superior interest in the safety of the highways of the various states than the uncounseled misdemeanant (as opposed to uncounseled felon) has in excising this particular collateral consequence. It is of note that the uncounseled misdemeanor conviction *and* the civil habitual offender proceeding were both prior to *Argersinger, supra.*

A further expansion of *Argersinger* and *Berry* to the facts of this case would be a significant expansion of the constitutional rule, which can be applied only in an unfair manner. It would allow a person of Mr. Whorley's status to challenge

successfully his separate and distinctly civil habitual offender determination after a deliberate violation of the law. The fact that such a person received a short prison term would grant him a favored treatment under the law in comparison to those persons who merely received fines as a result of uncounseled convictions, but who suffered the same collateral *civil* consequences. It is submitted that the Supreme Court of Virginia was entirely correct in its decision in the case below, and that this Honorable Court should consider the petition for a wrt of certiorari not well founded.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219